No. 89-1568

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

ARTHUR CHAMBLESS and
MILDRED H. CHAMBLESS,

Petitioners,

– against –

MASTERS, MATES & PILOTS PENSION PLAN, et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

REPLY BRIEF FOR PETITIONERS

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ARGUMENT

I. CERTIORARI IS URGENTLY NEEDED TO DISPEL A MISCONCEPTION REGARDING THE PURPOSE AND EFFECT OF ACTUARIAL ADJUSTMENTS

Defendants' brief denies that the remedy of an actuarial adjustment is an issue of first impression. (Br. p. 14.)

However, defendants' inability to cite any other case dealing with the issue itself refutes the denial.

Implicit in defendants' argument is the assumption that an actuarial adjustment and a retroactive benefit are necessarily the same thing as a matter of law.

However, the district judge did not think so, and gave cogent factual reasons for his finding. (A 69-70.)

Defendants' contention was squarely addressed by the district court, and it made a specific factual finding that an

actuarially adjusted pension is not the functional equivalent of an award of retroactive benefits. (A-69.)

Hence, there was no basis for the Court of Appeals treating it as a question of law.

The true "law of the case" is what the Second Circuit said it was at the time of making the second and most recent remand. Under it, the district court was to determine "the monetary benefits to which [Chambless] is entitled under the Plan." (A-84.) That is precisely what the district court proceeded to do.

Defendants' further contention that the issue was disposed of in the denial of the prior petition for certiorari is refuted by the Second Circuit's statement concerning the prematurity of

plaintiffs' prior motion to amend the judgment. (A-84.)

If such a motion was premature because Chambless was not yet eligible to receive pension benefits when it was made, such a motion a fortiori was premature when earlier made at a time when the district court judge clearly stated that he had not even considered the matter, and emphasized that further matters that needed to be determined "... can await the remand of this case to this Court." (A-116.)

Defendants' contention that there is no basis for the actuarial adjustment under the pension plan regulations fails to take into account that the regulations also would deprive retirees such as Captain Chambless of any wage related benefit at all.

Accordingly, a prime objective of the district court's decision was to prevent such a "harsh penalty," a penalty that in fact the district court found had been concealed from the pension plan participants. (A-128, 132.)

Defendants' brief misleads by focussing upon a non-issue -- the suspension of the pension while Captain Chambless continued to sail but under a different labor agreement.

As the district court stated (A-129):

> [T]he right to suspend benefits until age 65 is no comfort to defendants. They have not only suspended Chambless' rights to benefits until age 65 but have confiscated a considerable part of those benefits. While the cases allow suspension, none has approved a formula where the suspension results in greatly reduced benefits. Indeed, in Morse v. Stanley [732 F.2d 1139, 1144 (2d Cir. 1984)], the court was satisfied that all of plaintiffs' accrued benefits would be received, with interest, when they reached age 65 and explicitly cited this factor in setting forth

its reasons for allowing the funds to be withheld.

Captain Chambless was forced to continue to sail in order to protect his earning power not only in light of his wife's severe illness but also in view of the length of this litigation and uncertainty as to its ultimate outcome.

Whether the judgment of the district court should be deferred to in devising the remedy necessary to prevent the partial confiscation of the wage related benefit earned by Captain Chambless is well worthy of review by this Court.

II. A PRO FORMA DENIAL OF ANY FEE FOR AN APPEAL IN WHICH PLAINTIFFS PREVAILED ON A SIGNIFICANT AND SUBSTANTIAL ISSUE SHOULD BE REVIEWED

Defendants incorrectly contend that petitioners have waived their claim

concerning the Second Circuit's denial of a fee in connection with winning a significant and important aspect of the appeal. (Br. p. 34.)

In making such contention, defendants refer only to page 2 of petitioners' brief, and entirely overlook the extended discussion on pages 13-14, and the specific raising of the issue in Question 3 of the Questions Presented.

At every opportunity, plaintiffs fought to overturn the leading Second Circuit case, City of Detroit v. Grinnell Corp., 495 F.2d 448 (2d Cir. 1974), because mere reimbursement for payroll costs made no economic sense in the modern practice of law with its emphasis on reducing the cost of litigation.

As the panel below acknowledged in its decision, "[plaintiffs'] assertion

of Grinnell's demise initially appeared premature, but it subsequently proved prescient." (A-12.)

Prescience was not alone responsible for plaintiffs' success in prevailing on this important issue. The prescience involved was fortified by painstaking research and analysis of judicial trends, combined with perseverance.

The time spent fighting against an outdated legal principle (and winning) does not become gratis to defendants simply because, while the appeal was pending, a decision of this Court corroborated the correctness of plaintiffs' position. Liability for the value of the prescience and perseverance of plaintiffs' attorneys is a risk taken by defendants for insisting upon litigating losing issues by making contentions that they know to be flatly

inconsistent with the settled practice of virtually every major law firm in New York City, including the large law firm that represented them.

In such circumstances the Second Circuit's boilerplate denial of plaintiffs' motion for attorney's fees on the appeal (A-134-135) is a gross departure from the reasoned consideration required by this Court in Hensley v. Eckerhart, 461 U.S. 424, 435 (1983), which holds that it is not necessary for the prevailing party to win on every motion, or to prevail on every contention; "his attorney should recover a fully compensatory fee." (Emphasis added.)

III. DENIAL OF DISCOVERY RAISES AN IMPORTANT ISSUE RELATING TO THE ALLOWANCE OF ATTORNEY'S FEES

The issue raised by Question 2 in the Questions Presented of the Petition herein is shrugged off by defendants' claim that the conflict is with only one other Circuit (the Eleventh). (Br. p. 30.)

This contention misleads by failing to account for the district court case cited in the petition from the Third Circuit, and also the cases cited in the law review note referred to therein. (Pet. 51.)

Moreover, we are aware of no other case in which the fees on both sides were ultimately to be paid from under the same insurance policy.

This aspect of the case clearly presents an issue of first impression.

The plaintiffs submit that the conflicting decisions should be resolved over the discoverability of both the time records and billing practices of an opponent's attorney when (as here) the information is relevant to the positions taken by the opponent regarding the fee claim of its adversary.

Such information is relevant to the amount of time required on various aspects of the case as well as on the issue of the lodestar rate. Certainly the large firms such as the one that represented the defendants in this case are conscious of the prevailing market rates for such services in that area and take them into account when they establish their own hourly rates for services performed in the case.

In addition, when the fees on both sides are covered by an insurance policy

taken out by the pension plan for the protection of the participants as established in Sokolowski v. Aetna Life & Casualty Co., 670 F. Supp. 1199 (S.D.N.Y. 1987), the billing practices approved by the losing trustees held to have violated their fiduciary duties are highly relevant to the amounts recoverable by the other both because of the applicability of the doctrine of estoppel, and as evidence of discriminatory treatment against plaintiffs in the administration of the pension plan.

IV. THE DISCRIMINATORY DOUBLE STANDARD OF RECOVERY UNDER THE APPLICABLE INSURANCE POLICY CRIES OUT FOR REVIEW

Ironically, the attorney now representing the defendants herein is listed as the same attorney who was lead counsel in representing Aetna, the

insurance company involved in Sokolowski, supra (670 F. Supp. at 1200).

Thus counsel who here and now seeks to block review of the "small firm" recovery allowed for prevailing counsel is the same attorney who, in acting as counsel for Aetna, negotiated the munificent and disparate amounts paid under the same insurance policy to defendants for the services of their former "large firm" counsel who litigated and lost this case. (A-179-181.)

The irony is carried further by the substitution of this same counsel as attorney for the defendants in this case upon defendants' recent dismissal of its prior counsel, while the petition herein was pending, as an outgrowth of a conflict of interest situation.

Not only have former counsel for defendants themselves profited greatly from their litigation by attrition tactics against the plaintiffs in this litigation, but the propriety of their prior representation of these pension plan defendants at all is questionable in view of the fact that it is now suing them for malpractice. See front page item in the New York Law Journal, on January 26, 1990, entitled "Judge Removes Proskauer Over Fund Conflict," (New York Law Journal, Jan. 26, 1990, p. 22).

As indicated in Lowen v. Levy, New York Supreme Court, N.Y. County, N.Y.L.J. Jan. 26, 1990, p. 2, the pension plan trustees who are defendants in this case are now suing their former counsel for damages of over $28 million, alleging negligent failure to provide

proper legal counsel with regard to the pension plan regarding claims of breach of fiduciary duty.

The discriminatory method in which recovery of attorney's fees has been administered by these defendants under the insurance policy that supposedly was purchased primarily in the interest of pension participants such as Captain Chambless is part and parcel of the same discriminatory scheme that led to the attempted confiscation of the wage related portion of the pension benefit due Captain Chambless.

The first confiscation was of his pension benefit; the second confiscation was of the value of his claim for a fully compensatory attorney's fee under an applicable insurance policy.

The glaring discrepancy in treatment as shown by the discriminatory

treatment of fees due both sides under the same insurance policy, coupled with defendants' intransigent attitude toward settlement at any time in the course of this litigation is not disputed on the record. (A-164, ¶ 47; A-168, ¶ 5 ("at no time throughout this litigation have the Pension Plan defendants ever evinced the slightest interest in settling or have their counsel indicated any interest in pursuing the subject informally, although we have made continuing inquiries relating thereto.").)

As the petition herein demonstrates, the fee award in the present case uses a discriminatory "small firm" lodestar rate, and has the reverse effect of what an adjustment for delay in payment is supposed to accomplish.

The failure of the lower courts to recognize the necessity of adequate compensation for grudge-motivated litigation shows an essential lack of the broad vision required for continued enforcement of the rights of the underdog and the weak.

In employment cases, which constitute the applicable market, the law firms representing employer defendants are primarily the large firms. Smaller firms customarily represent the plaintiffs.

Thus, if the law firms representing plaintiffs are unable to compare their rates, time and billing practices against the large law firms representing defendants, they are being excluded from the most significant part of the market for the purpose of making meaningful and fair rate comparisons.

To automatically reduce the status of attorneys willing to battle the injustices committed by arrogant or lawless adversaries to what a given judge thinks are fees appropriate for a "small firm" lawyer will reduce or eliminate the incentives needed to take on such risky litigation.[1]

The district court assumed, without considering any relevant evidence on the subject, that lawyers in smaller firms always charge lower rates. It also

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[1] Defendants incorrectly contend that plaintiffs' counsel did not provide affidavits setting forth their own billing rates. (Br. pp. 24, 28.) Although the district court made the same mistake, this in fact is not the case, and plaintiffs' verified fee application plainly states (AA-543, ¶ 24): "The lodestar rates used above are applicant's historical rates." See also AA-560, AA-813, ¶ 4 and Exhibit B at A-824: "The guideline' rates [used in the Application] refer to the normal hourly billing rates used by our firm for client billing and fee application purposes during the periods in question."

assumed that their costs are less. (A-59.

But this Court categorically rejected cost factors such as overhead for the setting of attorney's fees in Blum v. Stenson. (465 U.S. at 892-96.)

As stated in Hensley, supra, the relevant issue is compensation, not costs. (461 U.S. at 435.)

For complex employment-related litigation, often requiring specialized experience, prevailing market rates cannot be determined by comparison with small firms practicing decedents' estates law, or firms engaging in other practice areas such as criminal or matrimonial law.

In order to compare apples with comparable apples, the attorney's fee rates for plaintiffs' attorneys must be set by reference to the rates of those

firms actually charging hourly rates for this type of litigation. Only thus can the prevailing market rate be determined.

Since the defense bar in employment or pension litigation consists mainly of large law firms, then the plaintiffs' counsel should be compensated in reference to the rates charged by those large firms for similar work performed by those with comparable skill, experience and reputation. This is what Blum requires.

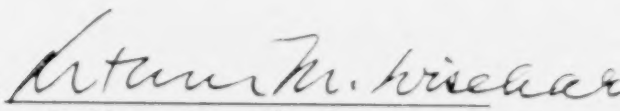
CONCLUSION

The petition for a writ of certiorari should be granted.

May 24, 1990

Respectfully submitted,

WISEHART & KOCH

By: 

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